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Published monthly by the Denver Bar Association and devoted to the interests of the Association.

The March Meeting

THE Association's regular monthly meeting was held March 5, 1928, at the Chamber of Commerce Building with President Robert L. Stearns presiding.

The following were unanimously elected to membership in the Association:

George H. Allan
Robert G. Baker
Charles J. Blakeney
Ernest C. Burck
Ora L. Capps
George Alfred Crowder
Donald C. McCreery
C. Milton Morris
Merle Dean Vincent

Twelve recently admitted attorneys were the guests of the Association at this meeting. After the transaction of the above business, L. Ward Bannister, Esquire, of the Denver Bar, was introduced as the speaker of the day and spoke on the subject, "Legal Phases of Recent Developments in the Colorado River Problem".

Mr. Bannister in opening his remarks, said that the old statement to the effect that "virtue is its own reward" is not accurate in his opinion. He said that he had been riding and standing on the water-wagon for five long years, so that now his friends insist upon talking about water until he begins to feel that they think he knows nothing about anything else.

He then referred to the decisions of Judges Hallett, Wells and Belford, which first announced the principles of the doctrine of appropriation of water to beneficial uses and said that they undoubtedly not only declared

law but made law, and that they were as much entitled to be called statesmen as any legislator. He said that the Colorado River problem was embedded in the question of water rights under the appropriation system, and that his discussion would be largely limited to a consideration of the legal phases of the Colorado River controversy.

He said that the problem is variable in that it means different things to each State. To California, it means flood protection, irrigation, and municipal supply with no revenue feature; to Arizona and Nevada it means power benefits and revenues to the state treasuries; to New Mexico, it means solely a division of water; to the Upper States (Colorado, New Mexico, Wyoming, and Utah) it means a segregation of water on definite lines so as to prevent the loss to the Upper States of all of the water of the River through prior appropriation in the Lower States,—or how to bring about a segregation of the water of the River for use in the Upper States. Mr. Bannister stated that this was due to the decision of the United States Supreme Court in the case of Wyoming vs. Colorado, to the effect that as to interstate streams, state lines will be disregarded and priority shall govern the use regardless of state lines. Under this doctrine, one state might take all of the water if its citizens appropriated the same prior to appropriations in other states.

He stated that Old Mexico uses 800,000 acre feet per year from the Colorado River waters under priorities, which are older than those of the Federal Government on the Gila River in New Mexico, and that priorities in California are older than those of the Federal Government. Therefore, in years of small supply, the Upper States must give up the water to the earlier priorities of Mexico and California, unless a segregation or division of the waters is made.

As an example of the need for prompt action, Mr. Bannister stated that twenty applications are now pending before the Federal Power Commission for the power rights on this River. Under an Act of Congress, the Federal Power Commission can issue no license for power rights until March, 1929. He said that this embargo might as well expire in June of 1928 because if any appropriate legislation is to be passed by Congress, it must be done during the long session, which ends in June of 1928, as there will not be sufficient time in the short session, commencing in December of 1928, for any contested legislation.

Twice since the year 1924, the Colorado River was so low in Arizona that it contained insufficient water to supply the earlier priorities below that point, because persons holding later priorities in the Upper States had withdrawn the water. He cited this as a further reason why the Colorado River problem is not going to solve itself and why we should take immediate affirmative action in the matter.

Mr. Bannister stated that there are 1,000,000 acres of land in Colorado not irrigated; that there are 3,700,000 acres of land in Colorado already irrigated from the Colorado River and other rivers. In addition to the above water demands in Colorado, he mentioned additional needs which will arise for municipalities. He stated that the Colorado River Compact offers a means of segregating the waters of the Colorado River. Under the terms of that Compact 7,500,000 acre feet would be allotted to the Upper States (Colorado, New Mexico, Wyoming, and Utah) and 8,500,000 acre feet to the Lower States (California, Arizona, and Nevada). These figures would be decreased somewhat when

by comity some appropriate arrangement is made with Mexico.

He then recalled the fundamental principle with reference to water—the thing to be divided is not the water itself but the right to use the water. He reminded his audience that the water in the streams belongs to no one and that while in the stream it is unowned.

He stated that the legal theory of the Compact was that the states have the power with the consent of the Federal Government to divide the use of the water in such manner as to bind the different water users within their respective states. He said there was legal authority for the transmission of water from one basin into another basin and that Colorado may bring water from the Colorado River to the eastern slope and that the Federal Government may move water from one state to another even though the drainage area does not lead back to the source of supply.

Digressing for a moment he told of attending the convocation at the University of Colorado in honor of Dean James Grafton Rogers. Upon entering the auditorium, he inquired of an usher where he might sit; the usher told him that he might sit any place except in the middle section, which was reserved for lawyers. He said he sat on the side.

Mr. Bannister then explained the three Colorado River Bills in Congress, known as the Swing, Johnson and Phipps Bills. The Swing and Johnson Bills are much alike, except that one depends upon the approval by six states and the other by three. He stated that five states had already passed statutes to the effect that when six states ratify the Colorado River Compact, it shall go into effect as to the six. He said that five states had ratified now out of the seven negotiating. Utah and Arizona have failed to ratify to this date. He said that under this Compact, California and Nevada assume the greatest burden in that if Arizona refuses to ratify, California and Nevada agree to give up enough water to make up Arizona's share. All of the Bills contemplate a government project at Boulder Canyon, which is on the border line between Arizona and Nevada, at an estimated cost of $125,000,000. He stated that another essential difference between the Bills was that the Swing and Johnson Bills give to the Federal Government the preferred right to own and operate the Dam and power plant although it may in its discretion grant the right to operate the power plant to a private enterprise. Under the Phipps Bill, the states are given the preferential rights. All of the Bills provide that the project is to be erected through the sale of water privileges.

He stated that the legal theory upon which the Government would assume this expenditure was that it would be improving the navigability of the Colorado River and hence affecting interstate commerce. He said that the Colorado River was navigated down stream from a point in Utah from which oil shipments were made, and that the navigability of the stream would be improved in that the flow would be equated for one hundred fifty miles below the Dam and a great lake would be created between Arizona and Nevada which would be one hundred ten miles long, five hundred feet deep and of varying width. He felt that if Congress declared this project to be for the improvement of navigation, then the Supreme Court of the United States would certainly follow Congress' declaration and sustain the legality of this legislation on that ground.

He said the theory of segregation was that the waters of the River should be administered in accordance with the Colorado River Compact. It

was felt that if Arizona did not ratify it could be compelled to comply with the terms thereof through the control by Congress over rights of way for ditches and canals on public lands. In other words, Congress could declare as a condition precedent to the issuance of a permit for rights of way over Government lands in Arizona that no water be carried under the same in conflict with the Colorado River Compact. Mr. Bannister felt that it is infinitely better for the Swing and Johnson Bills to be passed than no Bills at all. He referred to the Pittman Resolution, which requested that the Government be kept out of the power business and he felt that Utah could not be induced to ratify the Colorado River Compact unless the Pittman Resolution was complied with. He said that it was impossible to overestimate the importance to the Upper States of these matters because by this procedure the consent of California would be obtained, whereas now she has three times the appropriations of the State of Arizona and, further, the passage of any of these Bills would fortify the validity of the Colorado River Compact.

Mr. Bannister then commended Senator Phipps, Congressmen White and Taylor for their activities in connection with the above. He said that he had no information as to the position taken by the other members of Colorado's congressional delegation. He stated that he felt that Senator Phipps was working for the good of the state, although Mr. Bannister was originally opposed to some of his views. He said he also liked to say a good word for the Democrats, "because the Democrats need all the good words they can get".

In concluding, he said that opportunity was knocking at our door; that the recent Mississippi and New Eng-

Special Notice to Members

March 31, 1928.

The members of The Denver Bar Association are hereby notified as follows:

The Nominating Committee of this Association heretofore appointed by President Robert L. Stearns has made the following nominations for the ensuing year:

For President - - - - - - - - - - - Henry W. Toll
For First Vice President - - - - Hubert L. Shattuck
For Second Vice President - - - - - Philip Hornbein
For Trustees - - Charles J. Munz and Hamlet J. Barry

Pursuant to Section 3, Article 7 of the by-laws, further nominations may be made by filing with the Secretary at least fifteen days before the annual meeting the name or names of additional candidates bearing the written request of at least twenty members of the Association.

Pursuant to the by-laws, the annual meeting of the Association will be held at 6:00 P. M. on April 30, 1928, in the dining room of the Chamber of Commerce.

Respectfully submitted,
(Signed) ALBERT J. GOULD, JR.,
Secretary.

land floods had aroused congressional interest in flood legislation and that this sentiment would assist in the passage of one of the Colorado River Bills. Mr. Bannister hoped that the people in the Washington delegation would be a unit in demanding congressional legislation predicated on a six state basis if a seven state basis cannot be secured. —A. J. G.

What's Wrong With The Law?

Long-tailed Coats, Green Bags, Stuffy Pomposity Have Been Laughed Away, but Legal Machinery Intended for Rural Communities Creaks Badly Today—Juries and Judges, Laymen and Lawyers Must Act Now to Bring Justice Back to the Courts.

By Bethuel Matthew Webster, Jr.
Assistant United States Attorney for the Southern District of New York
Son of B. M. Webster of The Denver Bar

SECURITY of commercial transactions, peace of mind, happiness, and health—these depend upon efficient administration of justice. Yet the profession of law is in disrepute. Judicial machinery has broken down. Courts are despised and avoided. Most unfortunate of all, due mainly to shameful neglect, there is chronic, terrible failure of criminal justice.

Well, what can be done about it?

Laymen and lawyers have a joint responsibility. In taking remedial steps the bar must be provoked by an indignant, dissatisfied public. But that public must be enlightened. Failure of justice is not an occult occurrence. It is usually attributable to obvious, concrete flaws in the judicial machinery—an outworn part, an over-loaded engine, insufficient fuel. To lend intelligent assistance in correcting the imperfections, conscientious laymen must understand the operation of the jury system. They must scrutinize professional poses. They must determine whether the old machinery is adequate for present use.

The friction incidental to the operation of the jury system is a condition with which most laymen are familiar. One who has talked to many jurors, in and out of court, can say with assurance that the average private citizen is appalled and frightened into inactivity by the complicated business of the administration of justice. A feeling of the futility of individual effort is the bane of large-scale democracy. The consequence of this feeling—inactivity—is interpreted as apathy, self-interest, ignorance. It is not that.

The writer has seen few jurors who failed to take an active interest in a case on trial before them. Not infrequently, after trial, a juror calls on one of the attorneys to explain his action in a case. If, in a criminal case there has been a disagreement, the juror often makes suggestions respecting presentation of the case for retrial to the lawyers representing the side he favors, and not infrequently jurors apologize for the action of their fellows.

In spite of judicial admonition, jurors discuss cases with their relatives and business associates during recesses. They linger to ask questions after trial. The moral standards of a race, a generation or a community can

be learned from jurors after a criminal prosecution. The business ethics, the prejudices, the varied experiences of the rank and file can be determined by talking to persons who have served as jurors in a civil action.

Yet there are shocking miscarriages of theoretical justice. Juries in criminal cases commonly exercise their ancient prerogative of lawlessness. In the face of overwhelmingly convincing evidence they acquit defendants for reasons having no relation to the issues before them. In Colorado there is a story of a drought-stricken farmer jury that refused to convict because of the expense to the county in sending the prisoner to the state penitentiary in the custody of the sheriff.

Unethical reference to facts outside the competent evidence often results in disagreement or acquittal. Summation by counsel is supposed to be restricted to fair comment on the evidence; nevertheless, the jury in the first trial of Harry Daugherty and Thomas Miller for conspiracy to defraud the United States out of their honest services as public officials was led by counsel to believe that the ex-Attorney General destroyed material evidence in the form of bank records to preserve the memory of a dead President, a matter in respect to which there was not a shred of testimony.

Behind the seemingly willful and capricious actions of jurors there are causes which cannot be isolated by analysis or eliminated by exhortation.

One's action is determined by his endowment and his experience. It is now a notorious fact that it is practically impossible to convict a man of fraud in connection with the administration of public office. The armor of greatness is awe-inspiring, impenetrable, and, once sealed, is worn to the grave.

Jurors who have paid petty fees for "protection" seldom convict for bribery, however flagrant the case may be. Prosperous persons, such as merchants, bankers, manufacturers, are always challenged by the defendant's lawyers when the jurors are being chosen in commercial fraud cases. They are too cold, too exacting, too anxious to convict, especially if the accused is a small tradesman. And foolish is the district attorney who fails to account for the racial factor in selecting his jury and presenting his case.

Yet in some instances jurors are righteously indignant. A postal thief has little hope in any court. Most bank defaulters, on advice of counsel, plead guilty before trial. Narcotic peddlers are rarely acquitted.

Legislation enacted without regard for men's prejudices and the jury system can never be fully enforced.

Take the Mann act. Unless a child has been deceived or debauched, the law prohibiting interstate traffic in women is seldom the basis of prosecution, though it is commonly known that violations of the letter of the law are wholesale. Apart from evidence of shocking depravity, the obscenity sections of the Federal criminal code are largely enforced through civil or administrative action. Tax fraud cases, in the absence of special circumstances, are settled out of court.

Unless there is an element of bribery or perjury, in respect to which the community at large has a strong feeling, prosecutions under the prohibition act are rarely successful.

Jurors may disregard law and reason in reaching or in refusing to reach a verdict. They are endowed with that power by such phrases as "reasonable doubt" and "preponderance of evidence". Vague judicial definitions of these terms leave openings through which the individual juror is able to drive his prejudices.

A prosecution under criminal provisions of the bankruptcy act vividly illustrates this point. A small trades-

man going into bankruptcy must account to his trustee for every remaining asset of the enterprise. Though in theory he is not to be penalized for business failure, he must turn over to his creditors all property not legitimately disposed of in the course of business. Yet unless there is evidence of crude and brazen theft, such as removing merchandise or deliberately falsifying books of account, one who has concealed assets may confidently expect acquittal. The defendant is pitied and exonerated. A precept requiring good faith to a superlative extent is out of harmony with the *mores* and the business practices of the time.

One who attends court as juror or spectator cannot avoid noting that the Pickwickian deference anciently associated with trial practice is no longer displayed by bench or bar. The defendant gets a run for his money—a full day in court and an unrestrained lawyer. All concerned recognize that admonitions from the court may be utilized in a defendant's favor; reproof is often sought for what it is worth. A sporting jury will not convict if the court too closely limits a defender.

A prosecuting attorney may not interrupt to object before an improper question has been asked, hence the jury swallows the question before it has been ruled indigestible. For example, in a case tried by the writer, a doctor was called as a character witness. Before objection could be made and sustained it was proved to the satisfaction of the jury that the accused was suffering from heart disease. A subsequent direction by the court to disregard such testimony was utterly ineffectual. The defendant was found not guilty.

In the form of an attack on the credibility of a witness, a skillful cross-examiner is able to inject the most insidiously irrelevant, immaterial matter into the stenographic record. Though it is ruled improper, the unanswered question may plant the seed of "reasonable doubt". Intellectual dishonesty is manifested by confusion of issues, yet the reputation of the most successful trial practitioners rests on condonation of the practice.

The lawyer-client relationship is no longer self-consciously and hypocritically veiled. Realizing there is nothing essentially noble in any commercial relationship, bar associations frankly constitute committees to decide actual questions of professional ethics. The Association of the Bar of the City of New York has a department for registration of grievances and the institution of disbarment proceedings. So-called character committees, passing on applications for admission to practice, realistically emphasize educational fitness to the exclusion of other considerations. Though they chat of character, they sensibly refrain from weighing imponderables.

There was a time when jokes at the expense of the legal profession provoked snickers in any circle. Lawyers met a sally with embarrassment and assumption of dignity; they hastened to explain the tender priest-and-penitent-like relation between solicitor and client; they compared themselves to the doctor at the bedside of a sick patient.

In America this pose was associated with the long-tailed coat, the green bag, the assumption of dignity and learning, and it lingered as a characteristic of the bar long after the profession ceased to be trustee of learning power and public confidence.

The bar failed to see that the legal joke was evidence of smoldering distrust. Lawyers did not become more humble as learning became more diffuse, with the result that the law became a hide-bound, reactionary science at a time when professional resource-

fulness was the most essential quality. It has taken a generation to remove a meretricious sensitiveness.

Laymen cannot be expected to understand or correct the basic dogmas of criminal jurisprudence. Scientists and lawyers differ as to their validity and application. Apart from the plain maladministration of legal precepts and current notions, a condition the layman is quick to indicate, the doctrines of criminal law are being scrutinized by scientists in search for the basic causes of friction. Well equipped agencies have begun to collect data from which useful generalizations may be expected.

Comprehensive surveys of criminal justice in Cleveland and Chicago, the work of the Judge Baker Foundation in the field of juvenile delinquency, the research which the Harvard Law School is now seeking funds to undertake and the publication of numerous books treating particular phases of crime and criminal responsibility are examples of this fruitful process.

The old machinery, the old attitudes, the old dogmas—all have been stretched and strained by unprecedented social changes, and only recently, after twenty years of distrust, has the profession frankly asserted the need for fundamental alterations.

In making structural changes it is necessary to keep in mind the history of the reception and development of English law in America. Colonists, distrusting all British institutions, were reluctant to receive the aristocratic traditions and practices of the common law. They looked with disfavor on the practice of appointing judges not responsive to popular will; they hesitated to yield any of the functions for which they fought. Judges learned in the law were not required in some localities, and in at least one instance citation of English authorities was forbidden by statute. Colonial feeling was crystallized in constitutions and laws established a short-term, elective bench of limited authority.

The vigorous, self-sufficient population of mining camps and primitive farming communities was satisfied with a state of justice without law. They settled their own affairs with dispatch and satisfaction, and, incidentally, established customs which were later absorbed into the body of the law. People who could develop a system of mining and water rights without serious judicial interference had reason to be self-confident. It is not strange they favored elective judges with limited powers and low salaries.

The American system of court organization was devised to carry justice to a scattered rural population, and few special facilities were provided for sections in which population has since massed.

No one, however far-sighted, could have gauged the wear and tear to which courts thus constituted would be subjected. To the neglect of judicial organization, state legislatures have been absorbed in the task of enacting legislation required by the economic interests of a growing, prosperous country.

Constitutional amendments and bills providing long tenure of office, large discretion and adequate salaries—indispensable prerequisites of a competent, self-respecting judiciary—have only recently evoked popular approval.

In addition to major complaints, there are many petty causes for failure in administration of criminal justice. One of the most irritating of these is the manner of calling cases for pleading and trial in busy overloaded tribunals.

The court to which the writer is attached, a District Court of the United States, is perhaps less objectionable

than many state and city courts in this respect, yet on calendar days it is a madhouse. While prisoners in custody are pulled back and forth through a milling crowd of hangers-on, "chiselers", they are called, deputy marshals shout for silence, the clerk calls the jury list, the court bellows—and measures justice.

This is as undignified and demoralizing as it is unnecessary. It subjects a learned court to embarrassment and fatigue. It degrades the bar and the accused. The writer has been in petty criminal courts in London, Berlin, and outlying American cities, where there is no such turmoil as that to which residents of Chicago and New York have become accustomed.

Disorder and crude practice may be traced to the quarters in which a court is lodged. The want of efficiency and decorum seen in the New York courthouse illustrates the demoralizing effect of architecturally monstrous surroundings on the administration of justice.

New York County has experienced success in the employment of adequately compensated, more or less permanently employed prosecutors. Far-reaching benefits would flow from adoption of the same policy in Federal and state courts.

Generally speaking, members of the government's legal department have little of the fine sense of responsibility for excellent performance that actuates the staff of a first rate private firm. A $2,000 man can set wheels in motion which will cost the government many thousands of dollars. His lack of care or judgment is likely to cause the ruin of an innocent man.

Reformers despising the low-grade criminal bar suggest that reputable, high-class lawyers gratuitously devote a portion of their time to criminal cases. Such a scheme is impracticable.

In the first place, reputable, high-class lawyers could not obtain criminal clients. A criminal wants results and he doesn't care how they are secured.

He wants a lawyer who knows the ropes; he seeks a man favorably known to the district attorney and the court. It stands to reason he has no use for a condescending practitioner who is sensitive to petty sharp practice. Moreover, a criminal wants an attorney who can listen sympathetically to a candid story, a man who is equally efficient in securing bail bondsmen and adjournments.

The available remedy is neither Utopian nor complete. Two things can be done. Perfection of the mechanics of criminal practice will preclude innumerable potential abuses. Rigid bar association scrutiny will eliminate outrageously improper practices.

Public insistence on an overhauling of the entire structure, with allotment of salaries and officials commensurate with the business to be done, combined with facilities for the speedy and dignified disposition of criminal cases, will do much to dispel the current professional revulsion from criminal practice and help to restore public faith in bench and bar. A realistic, functional study of the administration of criminal justice, instead of the adoption of patronizing resolutions, is an immediate activity to which lawyers and legislators can devote themselves with a degree of hope. The present advantage of such action will be a more satisfactory application of existing law. And the stage will be set for the timely reception of new doctrine.

Benjamin Franklin

"Of him may be said, perhaps, with as much propriety as of any other man, that he never said a word too soon, nor a word too late, nor a word too much."—*John Bigelow.*

Corporate Mortgages and Reorganization Under Foreclosure

By Mr. W. M. Bond of the Denver Bar

Address recently delivered before the Law Club, Denver

FIFTEEN years ago old man Sherman Davenport and his wife got on a spree in the then customary manner which obtained in the Pea Ridge section of Eastern Carolina. They washed down handfulls of quinine with scuppernong wine, the wine drove the quinine home and the resulting effects were in all respects highly satisfactory.

About dusk as they were walking along the side road that leads from the main highway to the shore of the bay, a heated but not unusual argument arose in the course of which Sherman, without any felonious intent whatsoever, smacked his wife in the jaw. She fell backwards over a pine stump and most inconsiderately and unhappily broke her neck.

Greatly to Sherman's surprise and consternation he was brought up for trial for murder and I appeared for him.

A few days before the trial he remarked to me that he wanted to employ an old ante bellum celebrity named Colonel Sam Sprince to help me. I agreed, but stated, "Why do you want to employ old Colonel Sprince? He don't know any law." "I know that," replied Sherman, "but I'll be damned if he won't complicate things."

The analogy between the case of old Colonel Sam Sprince and your speaker today will no doubt be quite obvious. I am to confine my remarks, as far as possible, to corporate mortgages and reorganization under foreclosure.

I believe I should limit this to reorganization of corporations under foreclosure for I can pass for the purposes of this discussion the question of corporate mortgages by saying that a corporate mortgage, securing a bond issue, is a conveyance in trust by a corporation of a part or all of its properties to a trustee, usually a trust company.

This mortgage or deed of trust has through general usage become stereotyped and conventional in form. It is a most lengthy document and a rather ingenious conception; begins with a recital of the parties; describes the bonds secured by the mortgage; contains a full description of the property covered by the conveyance and then recites what shall be considered acts of default and how the default may be declared; makes provision for the exercise of the power of sale, if a foreclosure becomes necessary; and then, having disposed of such minor matters, for pages and pages, sets out the things for which the trustee shall not be held responsible—things which it shall be *conclusively* presumed not to know—and still further recitations for the trustee's protection in respect to its action if it by accident learns anything about the subject matter of the trust in its hands, with further sweeping statements in regard to the indemnification which shall be furnished it as a prerequisite to action on its part and with the final statement that the trustee shall, in no event, be responsible for the negligence of its attorneys—and, what is even more to the point, the trustee shall have a first and paramount lien against the trust property for its charges and expenses and the fees of its attorneys.

The bond issue secured by this deed of trust is executed on behalf of the corporation and passed to the trustee for certification by it, and delivery or issuance in conformity with the provisions of the deed of trust.

Sometimes this delivery by the trustee is merely a return of the bonds to the treasurer of the mortgagor corporation after they have been properly certified and listed upon the trustee's records, but, in a majority of cases, the trustee must, as a condition precedent to the delivery of the bonds, know that many provisions contained in the mortgage have been complied with, as, for instance, the filing of certificates as to earnings, appraisals of properties purchased and passing under the lien of the mortgage, and frequently the surrender for cancellation of bonds of an old maturing issue in lieu of a like amount of new bonds to be then issued.

It is rather customary now days for corporations to execute "open end mortgages", so-called, in which the amount of bonds to be issued and certified by the trustee is not specified or limited, one of the conditions of issuance being that upon filing of certain certificates as to new properties acquired, or additions to the plant, when coupled with a showing of specified earnings for twelve months last past, etc., new bonds may be forthwith certified by the trustee and delivered to the corporation, and, in this way, the amount of bonds outstanding and secured with equal priority may be increased from year to year, without in any way changing the original deed of trust or recording any further documents.

Clearly, under such a mortgage the trustee has a most responsible duty to perform.

Having provided for this financial set up of our prosperous corporation, we will now proceed to entertain the happy and pleasing thought that she goes head-foremost on the rocks, or, at least, gets into pretty stormy seas and a reorganization of its affairs is necessary.

A reorganization of a corporation is a business arrangement whereby the stock and bonds of the company are readjusted as to amount, income or priority; or the property is sold to a new corporation for new stock or bonds, or the property is sold by foreclosure of a mortgage upon it and the purchaser buys for himself and such of the stockholders and bondholders as he associates with him.

It is this last method of reorganization with which we are now concerned.

This reorganization of the affairs of a corporation whereby all security holders, as well as unsecured creditors, get something, is a modern conception and is in striking contrast with the older method of procedure, whereby the properties were sold under the first mortgage bought in for the bondholders and all other interests and creditors were completely wiped out.

The legal problems and questions involved in the foreclosure of a corporate mortgage upon the system of a transcontinental railroad and those incident to the foreclosure of a mortgage upon a house and lot go back, of course, to the same fundamental and underlying principles of equity. The handling of foreclosure suits involving the properties of large corporations and the reorganization thereof has attracted the greatest legal talent of the country and is a branch of the practice which is growing most rapidly and as the industrial and business development of the nation requires, will continue to grow. It is a most interesting subject and, of course, brings into the large law office, handling such matters, compensation of size undreamed of a generation ago. (I need

not add that I speak here only on information and belief.)

The successful handling of a corporate reorganization, the ability to get the ship off the rocks and start her on a new course with new financial machinery, requires in addition to legal training a sound financial experience and judgment and, in addition to all of this, very comprehensive and intricate plans must be perfected to carry out the details and necessary clerical routine involved in the transaction.

It would be impossible to handle the mechanical details of the foreclosure and reorganization of the properties of a large nationally owned corporation with the facilities offered by the modern trust department or trust company.

It is to this mechanical and clerical branch of the business and from the viewpoint of the Trust Company officials that my remarks are directed.

A corporation having outstanding several issues of bonds secured by deeds of trust, and having a wide distribution of its preferred and common stock, becomes unable to pay the interest due on the bonds and the dividends due to its preferred and common stockholders.

We will assume that this corporation is a public utility, and must continue to operate. Some of the holders of the various classes of outstanding securities meet. Usually at such a meeting, considerable blocks of securities are represented. Committees are selected to represent each class of securities. These committees prepare and send out to the security holders a statement of the organization of the committee or committees, a general statement of the affairs of the corporation, a showing of the necessity for combined action on the part of the bondholders and the designation of banks or trust companies in various centers who will act as depositaries, and issue certificates of deposits for, the securities which are delivered to them to be held for the Protective Committee.

These Bondholders Protective Agreements have become conventional in form. The holders of securities, wishing to act in co-operation with each other, deposit their securities with the depositary banks subject to the control and direction of the Committee and to be held for the Protective Committee. As soon as this committee becomes, in this way, the holder of a sufficient amount of bonds or securities, it calls upon the Trustee to institute such proceedings in Court as may be proper, either for the appointment of a Receiver, the foreclosure of the mortgage or such other action as the situation may require.

Usually, a Receiver is appointed to manage and control the properties pending the sale under foreclosure.

The Protective Committee considers plans of re-organization and if there are several classes of securities, each committee will attempt to keep in touch with all of the other committees, and in unison work out a plan for the financial rehabilitation of the company.

Sometimes all of the committees join in the selection of a re-organization committee.

Plans having been finally agreed upon; the committee, or committees, request the Trustee to obtain a decree of foreclosure and the re-organization committee, or protective committee, adopts and promulgates a plan and agreement of re-organization. This plan describes fully the method by which the committee hopes to reorganize the affairs of the corporation, the new classes of securities which will be issued and furnishes all other information which the security holders should have.

This plan is sent out to all of the se-

curity holders, who have deposited their securities with the committee. The depositors who have deposited their securities with the committee, are given an opportunity to withdraw from the plan and agreement, if the terms are not satisfactory to them, and usually non-depositors are afforded an opportunity to deposit their securities and come in under the plan and agreement of re-organization.

The properties are then sold under foreclosure decree and are bought in by the Re-organization Committee, pursuant to the plan and agreement of re-organization.

The old securities which have been deposited with the Committee are used to meet the purchase price bid at the foreclosure sale. A new corporation has been formed in the meantime and in exchange for the bonds and stock of the new corporation, the Re-organization Committee transfers and conveys to it all the properties which they have bought at the foreclosure sale, and then through the medium of the depositary banks delivers to each of the old security holders, in lieu of their certificates of deposit, the new bonds, stocks or securities to which they may be entitled under the plan and agreement of re-organization.

Almost always there are some bondholders who do not accept the plan and agreement of re-organization, or who refuse to deposit their bonds with the Protective Committee. Upon re-organization, they, of course, are not entitled to any part of the new securities and receive in cash their pro rata share of the sale price of the property, which may be applicable, under the foreclosure sale, to their respective classes of securities.

Usually, this minimum sale price—this up-set price—is fixed by the Court in the decree of foreclosure and is set at a figure which will pay on each non-deposited bond about ⅔rds of the average market price of the bond for the year immediately preceding the promulgation of the plan and agreement of reorganization.

The cash to meet this pro rata payment on non-deposited securities usually comes through an under-writing arranged by the Reorganization Committee. They arrange to sell through underwriters the block of the new securities which are not required to be given in exchange for old securities and with the money thus raised make the payment to the non-depositing security holders.

And thus the new corporation starts out on its career with a new name, new bonds and new stock. Its debts are wiped out, its sins forgiven and its trespasses forgotten.

It is quite an ingenious solution of a problem presented by the magnitude of modern business development. And in it final results is not unlike the statement of a colored boy for whom I once appeared down in North Carolina.

He was charged with larceny of a watch and I saw him sitting over on the prisoner's bench, forlorn and bedraggled because he was in a strange county. He was at least 30 miles from home. I asked him what his trouble was and he said he was about to be tried for stealing a watch. I asked him if he got the watch and he said he did. He was an old friend of mine, so I advised him to keep quiet and appeared for him. In the course of the trial, the loss of the watch was clearly shown at a big darky festival, but they couldn't connect Norman with the disappearance of the watch, although both he and the watch disappeared at about the same time. Finally the judge instructed the clerk of the Court to enter a verdict of not guilty because of failure of proof. "Norman," I said, "you are out of it. But you don't know how you got out,

do you?" "No suh," he said, "but it sho was neat work."

It is becoming more and more the tendency for the Reorganization Committee to act in close touch with the Court having jurisdiction over the foreclosure proceedings, and, recently, the Courts have attempted to provide for a reorganization in conjunction with the Reorganization Committees without requiring any foreclosure sale of the properties—notably the recent Chicago, Milwaukee, St. Paul R. R. reorganization.

This tendency to do away with the complicated machinery and expense of a foreclosure and the creation of an entirely new corporation is being borrowed from the British courts in respect to the reorganization of railroad companies, and this attitude of the British courts is based upon a statute expressly providing for the reorganization of railroad companies and the scaling down of the various securities with the consent of a majority of the holders of the various classes of securities.

As a matter of fact there is no such thing as a mortgage or deed of trust on properties of a Rail Road Company in England. It is prohibited by law.

Interwoven in this scheme of corporate foreclosure and reorganization is an important principle laid down by the Supreme Court of the United States in the case of Louisville, etc., Ry. v. Louisville Trust Co., 174 U. S., decided in 1899 and in the more recent decision Northern Pacific Ry. v. Boyd, 228 U. S. (1913), in which this doctrine is enunciated:

> "Insolvent corporations find it necessary to scale their debts and readjust their stock issues under a reorganization. This may be done in pursuance of a private contract between the bondholders and the stockholders, and though the corporate property is thereby transferred to a new company, having the same share holders, the transaction will be binding between the parties, but such a transfer by stockholders from themselves to themselves cannot defeat the claim of a non-assenting creditor, as against him the sale is void in equity.
>
> "The unsecured creditor must be provided for in the reorganization. His interest can be preserved by the issuance on equitable terms of income bonds or preferred stock. If he declines a fair offer he is left to protect himself as any other creditor of a judgment debtor. If, however, no such tender was made he retains the right to subject the interest of the old stockholders in the property to the payment of his debt. If their interest is valueless, he gets nothing. If it be valuable, he merely subjects that which the law had originally and continuously made liable for payment of corporate liabilities."

We Agree

"Some lawyers still seem to think they must practice, especially in the trial of cases, as though the law were some kind of game. They purposely make opposing counsel all the trouble possible, refuse reasonable stipulations, put off matters by subterfuge, and wind themselves up in so much red tape that they bring as much loss and discredit upon themselves as upon the bar. We are on the whole the greatest procrastinators in the world, and largely because of habit and following antiquated methods of handling our business. Lawyers of outstanding ability and success are always amenable to any suggestion which will bring to issue on the merits the question under consideration. The smaller minded the lawyer, the less successful he is, and, generally, the more pestiferous. Two things could accomplish much. If we could get a few of our leading lawyers to tell us rather intimately how they run their business and what we generally do that's unnecessary and foolish, a lot of us would improve our systems. And we might have a business executive, who

is acquainted with the practice of the law, tell us what the business world thinks would improve our handling of their business.

Our profession embraces some shysters, leeches who prey mostly upon the weak, needy and unfortunate. The strong hand of the law is about to strangle such practices. The battle may be strenuous, it cannot be accomplished without cost, trial and grief, but the final result is not in doubt. Some of the officers of the law are working into the hands of the attorneys who are engaged in illegal practices, and cappers, ambulance chasers, and some bail bond agents and other such ilk are working with such attorneys. Aggressive means, I believe, will be employed by the State Bar to end these practices and our Association intends to take a most active part in aiding the State Bar in this essential work. The other night I heard it well expressed by an experienced member of our Grievance Committee when he said in effect that the five per cent of the bar engaged in illegal practices brought obloquy and shame upon the whole bar."

From statement by Hubert T. Morrow, Esq., to Los Angeles Bar Assn. following his recent election as its President.

Colorado Supreme Court Decisions

(Editors Note—It is intended in each issue of the Record to print brief abstracts of the decisions of the Supreme Court. These abstracts will be printed only after the time within which a petition for rehearing may be filed has elapsed without such action being taken, or in the event that a petition for rehearing has been filed the abstract will be printed only after the petition has been disposed of).

No. 11,786

Edith Graham, Plaintiff in Error, v. Miles Francis and Bessie Francis, Defendants in Error.

Decided March 5, 1928
Judgment Affirmed

En Banc—Opinion by
MR. JUSTICE ADAMS

Adoption—Next Friend—Construction of Statute

Facts—G. is the mother of an illegitimate child born March 21, 1921. She abandoned the child, consented that it be adopted by F. and F., but later sought to withdraw this consent. In the adoption proceedings in District Court, no next friend was appointed for the child.

Holding—District Court, sitting as a court of chancery, had jurisdiction of cause and parties. By abandoning child, G. made immaterial her consent or lack of consent to the adoption. The failure to appoint a next friend (C. L. '21, Sec. 5512) cannot be assigned as error by G., because the next friend is required not for her protection but for that of the child, who is the only one who can raise the question.

No. 11,725

Edward B. Hurt, Plaintiff in Error, v. Frank Newmyer, et al, Defendants in Error.

Decided March 5, 1928
Judgment Affirmed

Dept. II—Opinion by
MR. JUSTICE ADAMS

Water Courses—Adverse Possession—Tacking

Facts—H. sued N. and others for damages and injunction to restrain them from using a ditch. Trial court found that N. was owner of the ditch and that he and his predecessors in title had been in possession for more than thirty years.

Holding—This court cannot consider assignments of error which refer to matters outside the record or which are obscure and indefinite. N. was entitled to succeed to all the rights of his predecessors in interest, so that H.'s contention that N.'s rights relate back only to N.'s possession is wrong.

No. 11956

The Board of Commissioners of the Colorado State Soldiers' and Sailors' Home, v. Albert C. Dunlap and Mrs. Luella M. Dunlap.

Decided March 5, 1928

Opinion by JUSTICE CAMPBELL

Certiorari

Facts—D. and D. were inmates of the Colorado State Soldiers' and Sailors' Home. D. and D. had been selling various articles of merchandise in a building on the grounds. The Board of Commissioners in charge of the home, entered an order prohibiting the sale of merchandise on the home grounds by private individuals. A and B. refused to comply, and were discharged from the home. D. and D. applied for a writ of *certiorari* to have the order of discharged vacated. Lower Court issued writ.

Held—Ordinarily writ of *certiorari* runs to a judicial body only and not to an administrative body, and the scope of the writ is limited to jurisdictional questions only.

Reversed:

No. 11947

People of the State of Colorado ex rel R. P. Brookes, v. Harry F. Crysler.

Decided March 5, 1928

Opinion by JUSTICE CAMPBELL

Usurpation of Office—Domicile

Facts—Relator seeks to oust Crysler as councilman for District Three, on grounds of non-residence therein for one year prior to election as required by the city charter under Speer Amendment of 1916. Crysler bought a house inside District Three from his father and removed thereto, with intention to abandon his old residence outside the district and acquire a new and permanent one at the new location. He had just moved in when the father, discovering the apartment he had expected to remove to was not ready, asked to re-occupy the house until the apartment was ready. Crysler consented and returned to his old house, but on the father's removal to his completed apartment, returned to the new house. Judgment for Crysler and relator appeals.

Held—Crysler, on his first removal to the new house, did so with definite intention to abandon the old residence and acquire a new and permanent one at the new house. Such divested the old residence and established the new, and being more than one year prior to the election, he was duly qualified.

Affirmed:

Justice

"Above all things is justice. Success is a good thing; wealth is good, honor is better; but justice excels them all. It is this which raises man above the brute, and brings him into communion with his Maker. To be able to stand impartial in judgment amid circumstances which excite the passions; to maintain your equipose, however, surging the currents around you, is to have reached the highest elevation of the intellect and the affections. To have the power of forgetting, for the time, self, friends, interests, relationship, and to think only of doing right toward another, a stranger, an enemy, perhaps, is to have that which man can share only with the angels, and with Him who is above men and angels."—*From speech by David Dudley Field in the Wm. M. Tweed case—a suit for $6,000,000, in 1865.*

Recent Trial Court Decisions

(*Editor's Note.*—It is intended in each issue of the Record to note interesting current decisions of all local Trial Courts, including the United States District Court, State District Courts, the County Court, and the Justice Courts. **The co-operation of the members of the Bar is solicited in making this department a success. Any attorney having knowledge of such a decision is requested to phone or mail the title of the case to Victor Arthur Miller, who will digest the decision for this department.** The names of the Courts having no material for the current month will be omitted, due to lack of space.)

DENVER DISTRICT COURT

DIVISION V.

HON. CHARLES C. SACKMANN

JUDGE

Facts—Execution issued September 15, 1925, to enforce judgment for payment of sum certain and providing for confinement in jail of judgment debtor in default of payment on demand by executing officer, for one year, *to commence on date of demand.* Execution returned, showing demand by sheriff, October 15, 1925, and failure to pay judgment. Body execution issued January 18, 1926, showing no return thereon. September 7, 1927, another body execution issued with defective return. Petitioner in jail under execution issued December 27, 1927, asks the court to quash the execution.

Held—Writ quashed.

Reasoning—The term of commitment began October 15, 1925, and expired one year later. After the year, the court lost jurisdiction to commit the defendant—this on theory that body execution statutes are penal and must be strictly construed.

Amicone v. McCrimmon, No. 84825

Supreme Court Library

In addition to our files of Statutes, Reports, Digests, Search Books, Legal Periodicals, etc., which are kept up to date on subscription, we have placed in the library during the past three months the following:

Bowers, Civil Process and its service, 1927;

Bradbury's Code Pleading, 3 vols., 1927;

Bancroft's Code Practice and Remedies, 4 vols., 1927;

Bancroft's Probate Practice, 4 vols., 1928;

Wiltzie, Mortgage Foreclosure, 1927;

Cooley's Briefs on Insurance, 7 vols., to date;

Frankfurter & Landis, Business of the Supreme Court, 1927;

R. I. Decisions, vols. 1 and 2 to date;

Thompson on Corporations, 1927;

U. S. Board of Tax Appeals, complete in 4 vols. to date;

Hopkins, New Federal Penal Code, 1928;

Hopkins, Federal Equity Rules, 5th Ed., 1928;

McQuillan. Municipal Corporations, 2nd Ed., 1927;

Burdick, Law of Torts, 4th Ed., 1927;

Odgers, (Eng.) Pleading and Practice, 9th Ed., 1927;

Engelman, History of Continental Process, 1927;

Scott, Sovereign States and Suits, 1927;

Parker, Corporation Manual, 1928;

Roberts, Patentability and Patent Interpretations, 1927;

Hillyer's Corporate Management and By-laws, 1927;

Hubbell's Legal Directory, 1928;

Martindale's Directory, 1928;

Legal Periodical Digest, vol. 1;

Muller, Federal Supreme Court, 1927;

Kocoureck, Jural Relations, 1927;

Longenecker, Hints on Trial of Law Suit, 1927;

Whitten, Valuation of Public Service Corporations, 2nd Ed. 1928;

Dunn's Pure Food and Drugs, 1927;

Blakemore on Prohibition, 1927;

Green, Proximate Cause, 1927;

Foulke, Federal Income Tax, 1927;

U. S. Code, Annotated, complete to date;

La. Court of Appeals Reports, 6 vols.;

Canada Criminal Cases, 48 vols., to date.

FRED Y. HOLLAND, Librarian.

NOTE!

As one of the purposes of THE RECORD is to afford a means for free expression by members of the bar on subjects of benefit to the profession, and as the widest range of opinion is desirable in order that the different aspects of these matters may be presented, the editors assume no responsibility for the opinions in signed articles, the fact of their publication indicating only the belief of the editors that the subject treated merits consideration and attention.

Good Bench—How Obtained

"The only means of having a good bench is to adopt the English plan, give liberal salaries to your judges, let them hold their offices during good behavior, and when they begin to exhibit symptoms of senility and decay, hint to them that their pensions are ready to be paid them. The last is a necessary part of the system, but it is what the American people can never be brought to submit to. They are economical (God save the mark!) and, therefore, will not spend money without a present and palpable *quid pro quo*, they are metaphysical, and, therefore, they will not violate what is called, we know not why, principles. They deem anything preferable. Extinguish the light of Kent and Spencer, submit to the drivelings of dotage and imbecility, nay, even resort to the abominations of an elective judiciary system, anything rather than adopt the plain, manly, and only sure means of securing the greatest blessing but liberty, which civil society can attain to, the able administration of the laws."—*Legare's 'Review, of Kent's Commentaries.' 2 Writings, 141.*

James A. Garfield

Poverty. "Poverty is uncomfortable, as I myself can testify; but nine times out of ten the best thing that can happen to a young man is to be tossed overboard and compelled to sink or swim for himself."

The First Invention

"When Adam observed his nakedness, the observation was not lost upon him; for it immediately led to the first of all inventions of which we have any direct account—the fig-leaf apron."—*From Lincoln's Lecture on 'Discoveries, Inventions and Improvements', before the Springfield, Ill., Library Ass'n, Feb. 22, 1860.*

CHAS. H. SCOTT
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